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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ROY KLEVENO,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security
16 Administration,

17 Defendant.
18

Case No. ED CV 12-769-SP

MEMORANDUM OPINION AND
ORDER

19 I.

20 INTRODUCTION

21 On May 17, 2012, plaintiff Roy Kleveno filed a complaint against the
22 Commissioner of the Social Security Administration (“Commissioner”), seeking a
23 review of a denial of a period of disability, disability insurance benefits (“DIB”),
24 and supplemental security income (“SSI”). Both plaintiff and defendant have
25 consented to proceed for all purposes before the assigned Magistrate Judge
26 pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for
27 adjudication without oral argument.
28

1 Plaintiff presents four issues for decision: (1) whether the Administrative
2 Law Judge (“ALJ”) properly considered the opinion of treating physician, Dr.
3 Stephen Estes; (2) whether the ALJ gave the proper weight to the opinions of
4 examining and State Agency physicians; (3) whether the ALJ properly considered
5 the opinion of a lay witness; and (4) whether the ALJ properly discounted
6 plaintiff’s credibility. Memorandum in Support of Plaintiff’s Complaint (“P.
7 Mem.”) at 6-25; Memorandum in Support of Defendant’s Answer and in
8 Opposition to Plaintiff’s Memorandum in Support of Complaint (“D. Mem.”) at 2-
9 10.

10 Having carefully studied, inter alia, the parties’s moving papers, the
11 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
12 that, as detailed herein, the ALJ: (1) failed to properly consider the treating
13 physician’s opinion; (2) properly considered the opinions of the examining and
14 State Agency physicians, except to the extent he accepted the State Agency
15 physician’s opinion regarding plaintiff’s ability to stand and walk; (3) failed to
16 properly consider the lay witness testimony; and (4) discounted plaintiff’s
17 credibility based on reasons that were not entirely clearly and convincing.
18 Therefore, the court remands this matter to the Commissioner in accordance with
19 the principles and instructions enunciated in this Memorandum Opinion and
20 Order.

21 II.

22 FACTUAL AND PROCEDURAL BACKGROUND

23 Plaintiff, who was fifty-two years old on the date of his December 28, 2010
24 administrative hearing, has a GED. AR at 32, 154, 164. Plaintiff has past relevant
25 work as an owner of a gem and mineral shop, jewelry store manager, and
26 subcontractor for cement masonry work. *Id.* at 53-54

27 On May 26, 2009, plaintiff filed an application for a period of disability and
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1 DIB and an application for SSI, alleging an onset date of May 5, 2009, due to a
2 heart attack. *Id.* at 140-41, 144-51, 159. The Commissioner denied plaintiff's
3 applications initially and upon reconsideration, after which he filed a request for a
4 hearing. *Id.* 69-73, 76-81.

5 On December 28, 2010, plaintiff, represented by counsel, appeared and
6 testified at a hearing before the ALJ. *Id.* at 32-59. The ALJ also heard testimony
7 from James Constant, a lay witness, and Troy Scott, a vocational expert. *Id.* 50-
8 57. On January 11, 2011, the ALJ denied plaintiff's claim for benefits. *Id.* at 18-
9 28.

10 Applying the well-known five-step sequential evaluation process, the ALJ
11 found, at step one, that plaintiff had not engaged in substantial gainful activity
12 since May 5, 2009, the alleged onset date. *Id.* at 20

13 At step two, the ALJ found that plaintiff suffered from the following severe
14 impairments: acute myocardial infarction and heart failure. *Id.*

15 At step three, the ALJ found that plaintiff's impairments, whether
16 individually or in combination, did not meet or medically equal one of the listed
17 impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the
18 "Listings"). *Id.* at 21.

19 The ALJ then assessed plaintiff residual functional capacity ("RFC"),¹ and
20 determined that he had the RFC to perform a significant range of light work with
21 the following restrictions: lift/carry twenty pounds occasionally and ten pounds
22 frequently; stand/walk six hours out of an eight-hour workday with a sit/stand
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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,
26 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step
27 evaluation, the ALJ must proceed to an intermediate step in which the ALJ
28 assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486
F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 option; sit for two hours in an eight-hour workday; and avoid exposure to
2 unprotected heights and dangerous machinery. *Id.*

3 The ALJ found, at step four, that plaintiff was capable of performing his
4 past relevant work as a jewelry store manager and jewelry store owner. *Id.* at 26.

5 The ALJ also made an alternative, step five finding that there are other jobs
6 existing in significant numbers in the national economy that plaintiff can also
7 perform, including electronic worker, cashier, and packing machine operator. *Id.*
8 at 26-27.

9 Consequently, the ALJ concluded that plaintiff did not suffer from a
10 disability as defined by the Social Security Act. *Id.* at 27-28.

11 Plaintiff filed a timely request for review of the ALJ's decision, which was
12 denied by the Appeals Council. *Id.* at 1-3. The ALJ's decision stands as the final
13 decision of the Commissioner.

14 III.

15 STANDARD OF REVIEW

16 This court is empowered to review decisions by the Commissioner to deny
17 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
18 Administration must be upheld if they are free of legal error and supported by
19 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001)
20 (as amended). But if the court determines that the ALJ's findings are based on
21 legal error or are not supported by substantial evidence in the record, the court
22 may reject the findings and set aside the decision to deny benefits. *Aukland v.*
23 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
24 1144, 1147 (9th Cir. 2001).

25 "Substantial evidence is more than a mere scintilla, but less than a
26 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such
27 "relevant evidence which a reasonable person might accept as adequate to support
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a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ’s finding, the reviewing court must review the administrative record as a whole, “weighing both the evidence that supports and the evidence that detracts from the ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “cannot be affirmed simply by isolating a specific quantum of supporting evidence.” *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the evidence can reasonably support either affirming or reversing the ALJ’s decision, the reviewing court “may not substitute its judgment for that of the ALJ.” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

IV.

DISCUSSION

A. Not All of the Reasons the ALJ Provided for Discounting Plaintiff’s Credibility Were Clear and Convincing

Plaintiff argues that the ALJ failed to make a proper credibility finding. P. Mem. at 22-25. Specifically, plaintiff contends that the ALJ’s three reasons for an adverse credibility finding were not clear and convincing. *Id.*

The ALJ must make specific credibility findings, supported by the record. Social Security Ruling (“SSR”) 96-7p.² To determine whether testimony concerning symptoms is credible, the ALJ engages in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ

² “The Commissioner issues Social Security Rulings to clarify the Act’s implementing regulations and the agency’s policies. SSRs are binding on all components of the SSA. SSRs do not have the force of law. However, because they represent the Commissioner’s interpretation of the agency’s regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations.” *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th Cir. 2001) (internal citations omitted).

1 must determine whether a claimant produced objective medical evidence of an
2 underlying impairment ““which could reasonably be expected to produce the pain
3 or other symptoms alleged.”” *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d
4 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of
5 malingering, an “ALJ can reject the claimant’s testimony about the severity of her
6 symptoms only by offering specific, clear and convincing reasons for doing so.”
7 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Benton v. Barnhart*, 331
8 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may consider several factors in
9 weighing a claimant’s credibility, including: (1) ordinary techniques of credibility
10 evaluation such as a claimant’s reputation for lying; (2) the failure to seek
11 treatment or follow a prescribed course of treatment; and (3) a claimant’s daily
12 activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*,
13 947 F.2d at 346-47.

14 At the first step, the ALJ here found that plaintiff’s medically determinable
15 impairments could reasonably be expected to cause the statements alleged. AR at
16 23. At the second step, because the ALJ did not find any evidence of malingering,
17 the ALJ was required to provide clear and convincing reasons for discounting
18 plaintiff’s credibility. The ALJ discounted plaintiff’s credibility because: (1)
19 plaintiff failed to report all of his earnings; (2) plaintiff made inconsistent
20 statements about why he stopped working; and (3) his daily activities were
21 inconsistent with his alleged symptoms.³ *Id.* at 21-23.

24 ³ Although the ALJ characterized plaintiff’s treatment as conservative and
25 cited the conservative treatment as a basis for rejecting the opinion of the treating
26 physician, he did not expressly cite conservative treatment as a ground to discount
27 plaintiff’s credibility. *See* AR at 25; *see Parra v. Astrue*, 481 F.3d 742, 751 (9th
28 Cir. 2007) (“[E]vidence of ‘conservative treatment’ is sufficient to discount a
claimant’s testimony regarding severity of an impairment.”).

1 The ALJ's first ground for discounting plaintiff's credibility was his failure
2 to report earnings between 1985-1990 and in 2008. *Id.* at 21-22. The failure to
3 comply with law and report income may be a legitimate reason to find a claimant
4 less credible. *See Berger v. Astrue*, 516 F.3d 539, 546 (7th Cir. 2008) (failure of
5 claimant to report income on his income taxes "could justify a more skeptical view
6 of his testimony"); *see also James v. Astrue*, No. 11-01471, 2012 WL 3206690, at
7 *6 (C.D. Cal. Aug. 6, 2012) (finding the failure to report income to the IRS was a
8 clear and convincing reason to reject claimant's credibility).

9 The ALJ correctly noted that plaintiff worked as a subcontractor between
10 1985 and 1990, and that his DIB Insured Status Report reflected zero income for
11 that period. AR at 153, 166. At the hearing, plaintiff testified that he reported the
12 earnings, but the IRS claimed to not have received them. *Id.* at 40-41. Plaintiff
13 further testified that he hired an attorney to handle the tax matter and it was
14 determined that he owed no taxes. *Id.* at 41. Although plaintiff offered an
15 explanation as to why the record reflected zero earnings from 1985 through 1990,
16 there was no evidence in the record to support his explanation. As such, the ALJ's
17 finding was supported by substantial evidence. *See Aukland*, 257 F.3d at 1035
18 ("If the evidence can support either outcome, the court may not substitute its
19 judgment for that of the ALJ.") (citation omitted).

20 The evidence concerning plaintiff's 2008 earnings is similarly conflicting.
21 There are again records to show that, although plaintiff owned his own retail
22 business (apparently a mall kiosk) in 2008, his DIB Insured Status Report shows
23 no earnings for 2008. AR at 153, 166; *see id.* at 41-42. The ALJ stated that
24 plaintiff testified that he made \$3000 per month while self-employed, but failed to
25 report any income in 2008. AR at 21-22. The ALJ's assessment did not
26 accurately represent plaintiff's testimony. Plaintiff ran a mall kiosk in 2008 and a
27 jewelry store from January through early May 2009. *Id.* at 40-41, 43. Plaintiff
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1 testified that in April 2009, after his mother was diagnosed with stage four cancer,
2 he decided to close his store, which was “not doing the \$3,000-a-month business,”
3 and go back to work part-time for his former employer. *Id.* at 40. Although the
4 testimony was not a model of clarity, plaintiff did not testify that he made \$3000
5 per month while running the kiosk. Instead, he testified that he “made
6 approximately \$3,000 . . . for . . . two months,” which can be interpreted as either
7 that he made \$3,000 a month for two months or that he made \$3000 in two
8 months. *See id.* at 43. Plaintiff then testified that he reinvested the money and
9 subsequently the kiosk failed to make money. *Id.* If plaintiff’s kiosk did not result
10 in net earnings, as he implied in his testimony, then he would not have had income
11 to report. Plaintiff offered to provide the ALJ his tax forms from 2008 as
12 clarification, but the ALJ declined. *Id.* Again, because the documentary evidence
13 reasonably supported the ALJ’s finding and the testimonial evidence did not, the
14 court finds this reason to be supported by substantial evidence. *See Aukland*, 257
15 F.3d at 1035.

16 The ALJ’s second ground for discounting plaintiff’s credibility was not
17 supported by substantial evidence. The ALJ stated that plaintiff provided
18 inconsistent testimony about why he stopped working, reporting in his application
19 that he stopped working due to his heart condition but testifying that he stopped
20 because his mother was ill. *Id.* at 21-22. Again, the ALJ misconstrued plaintiff’s
21 statements.

22 Plaintiff made three statements as to why he closed the store and/or stopped
23 working. In his Disability Report, plaintiff reported that he stopped working due
24 to his heart attack and “cannot run the business.” *Id.* at 159. Plaintiff later
25 reported to a hospital, upon admission for chest pain, that the economic downturn
26 caused him to lose his store. *Id.* at 288. During the hearing, plaintiff testified that
27 he closed the store because he needed to take care of his sick mom and the store
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1 was not doing well as planned, and that he intended to work part-time at his
2 former place of employment. *Id.* at 40. None of these reasons were inconsistent.
3 Plaintiff chose to close the store and take care of his mother because the store was
4 not making as much money as expected. *See id.* And plaintiff testified that prior
5 to his heart attack, he intended to work part-time once he closed his store. Thus,
6 both plaintiff's mother's illness and the economy played into his decision to close
7 the store, and his subsequent heart attack prevented him from returning to work as
8 planned following the closing of his store. *See id.* Because this testimony was not
9 inconsistent, it was not a valid ground for discounting plaintiff's credibility.

10 The third ground provided for an adverse credibility hearing was plaintiff's
11 daily activities. *Id.* at 22-23. The ALJ argued that plaintiff's daily activities were
12 inconsistent with his alleged symptoms and established that he was capable of
13 working. *Id.* Specifically, the ALJ noted that plaintiff engaged in activities which
14 required the same physical abilities necessary for employment, including taking
15 care of his personal hygiene, cooking, doing some household chores, driving,
16 feeding his dog, and riding a bicycle. *Id.* The ALJ also noted that plaintiff's
17 activities contradicted his testimony. *Id.* at 22.

18 Inconsistency between a claimant's alleged symptoms and his daily
19 activities may be a clear and convincing reason to find a claimant less credible.
20 *Tommasetti*, 533 F.3d at 1039 ; *Bunnell*, 947 F.2d at 346-47. But "the mere fact a
21 [claimant] has carried on certain daily activities, such as grocery shopping, driving
22 a car, or limited walking for exercise, does not in any way detract from [his]
23 credibility as to [his] overall disability." *Vertigan v. Halter*, 260 F.3d 1044, 1050
24 (9th Cir. 2001). A claimant does not need to be "utterly incapacitated." *Fair v.*
25 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

26 Here, plaintiff's ability to care for himself, do some household chores, cook,
27 and drive was not inconsistent with his alleged symptoms and did not suggest that
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1 he was capable of working. Plaintiff spent about thirty minutes a day cooking and
2 fifteen to twenty minutes a day cleaning or doing laundry. AR at 197. Even when
3 taken together, these were not significant amounts of time devoted to cooking and
4 cleaning. Moreover, plaintiff stated that he did not do any other major household
5 chores. *Id.* None of these daily activities, in duration or exertion level, suggested
6 that plaintiff could work an eight-hour day. Plaintiff's bicycle exercise, pursuant
7 to his doctor's recommendations, may, however, be relevant. *See id.* at 45. If
8 plaintiff is able to engage in bicycle riding without fatigue, that would diminish
9 plaintiff's credibility. Yet, the ALJ failed to ask plaintiff how long he rode his
10 exercise bicycle, his exertion level, or if he required rest breaks. Nor did plaintiff
11 volunteer this information.

12 Further, although plaintiff's testimony was not entirely consistent with his
13 previous statements, the inconsistencies were minor. As the ALJ noted, plaintiff
14 reported that he could only lift approximately two pounds, yet he could wash pots
15 and pans. *Id.* at 22, 159. The ALJ also noted that contrary to plaintiff's statements
16 that he got tired when he exerted himself and could only walk for ten to fifteen
17 minutes, he testified that he walked around the block twice daily and rode an
18 exercise bicycle. *Id.* at 22, 177. None of these possible inconsistencies are
19 significant. With regard to lifting, even assuming that pots and pans weigh more
20 than two pounds, most are not significantly heavier than two pounds. As for
21 plaintiff's ability to walk around the block and use the exercise bicycle, plaintiff
22 also reported that he got winded from the walks, required rest, and often took a
23 nitroglycerine pill to help with the pain. *Id.* at 177, 200. And as discussed *supra*,
24 plaintiff never testified as to the duration of his bicycle exercise.

25 In sum, because there was evidence that plaintiff failed to comply with the
26 law by reporting his earnings in some years, this was a clear and convincing
27 reason to discount plaintiff's credibility, but the ALJ's remaining reasons were
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1 not. The court need not decide whether the ALJ's credibility determination
 2 remains legally valid despite the errors, because the court is remanding the
 3 decision on other grounds discussed *infra*. This remand will provide the ALJ the
 4 opportunity to further inquire about plaintiff's reporting of income and obtain any
 5 evidence plaintiff has to offer regarding his income.

6 **B. The ALJ Erred in Part in His Consideration of the Medical Opinions**

7 Plaintiff complains that the ALJ failed to properly consider the opinion of
 8 his treating, examining, and State Agency physicians. P. Mem. at 6-18.
 9 Specifically, plaintiff argues that: the ALJ failed to provide specific and
 10 legitimate reasons for rejecting his treating physician's opinion; the ALJ should
 11 not have given significant weight to the examining physician's opinion; and
 12 without the examining physician's opinion, the State Agency physician's opinion
 13 did not constitute substantial evidence. *Id.*

14 In determining whether a claimant has a medically determinable
 15 impairment, among the evidence the ALJ considers is medical evidence. 20
 16 C.F.R. §§ 404.1527(b), 416.927(b). In evaluating medical opinions, the
 17 regulations distinguish among three types of physicians: (1) treating physicians;
 18 (2) examining physicians; and (3) non-examining physicians. 20 C.F.R.
 19 §§ 404.1528(c),(e), 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
 20 1995) (as amended). "Generally, a treating physician's opinion carries more
 21 weight than an examining physician's, and an examining physician's opinion
 22 carries more weight than a reviewing physician's." *Holohan*, 246 F.3d at 1202; 20
 23 C.F.R. §§ 404.1527(c)(1)-(2), 416.927(c)(1)-(2). The opinion of the treating
 24 physician is generally given the greatest weight because the treating physician is
 25 employed to cure and has a greater opportunity to understand and observe a
 26 claimant. *Smolen*, 80 F.3d at 1285; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
 27 Cir. 1989).

1 Nevertheless, the ALJ is not bound by the opinion of the treating physician.
 2 *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the
 3 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,
 4 81 F.3d at 830. If the treating physician's opinion is contradicted by other
 5 opinions, the ALJ must provide specific and legitimate reasons supported by
 6 substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide
 7 specific and legitimate reasons supported by substantial evidence in rejecting the
 8 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a
 9 non-examining physician, standing alone, cannot constitute substantial evidence.
 10 *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v.*
 11 *Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d
 12 813, 818 n.7 (9th Cir. 1993).

13 **1. Medical History**

14 On May 5, 2009, plaintiff was admitted to the St. Bernardine Medical
 15 Center after developing shortness of breath and chest pain. AR at 222-23. Dr.
 16 Stephen J. Estes, a cardiologist, treated plaintiff. *Id.* Tests showed that plaintiff
 17 had a totally occluded left anterior descending artery ("LAD") and a 50-50%
 18 circumflex stenosis in the right. *Id.* Dr. Estes placed a stent in the LAD. *Id.* at
 19 227. Subsequent tests showed that plaintiff had poor left ventricular function with
 20 diffuse hypokinesis and an ejection fraction around 20-25%.⁴ *Id.* Dr. Estes
 21 diagnosed plaintiff with acute anterior wall myocardial infarction, ventricular
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 24 ⁴ Ejection fraction is a "measurement of how much blood the left ventricle
 25 pumps out with each contraction."
 26 [http://www.heart.org/HEARTORG/Conditions/HeartFailure/SymptomsDiagnosis](http://www.heart.org/HEARTORG/Conditions/HeartFailure/SymptomsDiagnosis/fHeartFailure/Ejection-Fraction-Heart-Failure-Measurement_UCM_306339_Article.jsp)
 27 [fHeartFailure/Ejection-Fraction-Heart-Failure-Measurement_UCM_306339_Artic](http://www.heart.org/HEARTORG/Conditions/HeartFailure/SymptomsDiagnosis/fHeartFailure/Ejection-Fraction-Heart-Failure-Measurement_UCM_306339_Article.jsp)
 28 [le.jsp](http://www.heart.org/HEARTORG/Conditions/HeartFailure/SymptomsDiagnosis/fHeartFailure/Ejection-Fraction-Heart-Failure-Measurement_UCM_306339_Article.jsp). A normal heart's ejection fraction is between 50%-70%. *Id.* An ejection
 fraction between 40% and 55% indicates damage. *Id.* An ejection fraction under
 40% may be evidence of heart failure or cardiomyopathy. *Id.*

1 fibrillation arrest and respiratory failure secondary to the myocardial infarction,
2 congestive heart failure, and poor left ventricular function. *Id.* at 228.

3 Dr. Estes continued to treat plaintiff after the heart attack, examining him
4 once every three months.⁵ *See id.* at 328-30, 357-60. During the follow up
5 appointments, plaintiff complained of chest pain, shortness of breath, fatigue, and
6 right hip pain. *See id.* The objective findings regarding the heart and lungs were
7 within normal limits, but Dr. Estes observed that plaintiff had difficulty walking
8 without getting short of breath. *See id.* Dr. Estes could not determine the cause of
9 the chest pain or shortness of breath, but opined that plaintiff's poor left
10 ventricular function and ejection fraction may have been the cause. *Id.* at 360. Dr.
11 Estes further opined that plaintiff's condition was stable, but that he had
12 significant limitations in his ability to work due to his fatigue, shortness of breath,
13 and chest pain. *Id.* at 357, 359. Dr. Estes treated plaintiff with a variety of
14 medications. *See, e.g., id.* at 328.

15 On June 22, 2009, plaintiff was admitted to Riverside Community Hospital
16 due to chest pain. *Id.* at 288-96. Dr. Kaustubh V. Patankar, a cardiologist,
17 performed a left heart catheterization,⁶ left ventriculography, coronary
18 angiography, and abdominal aortic angiography with bilateral iliac angiography.
19 *Id.* at 297-98. Dr. Patankar observed that plaintiff had a left ventricular ejection
20 fraction of 40% with anteroapical hypokinesis,⁷ a stent in the proximal LAD, and
21 a 100% occluded ostial iliac artery. *Id.* at 297. Based on these tests, Dr. Patankar
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24 ⁵ As of the hearing date, Dr. Estes decided to examine plaintiff on a six-
month rather than three-month basis. AR at 38.

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26 ⁶ It appears that Dr. Patankar may have conducted an angioplasty at this time.
See id. at 368.

27
28 ⁷ An earlier test conducted by Riverside Community Hospital showed an
estimated left ventricular ejection fraction of 37%. *Id.* at 299.

1 recommended that plaintiff return on a later day to try to open up the iliac artery.⁸
2 *Id.*

3 On August 28, 2009, Dr. Bahaa Girgis, a consulting internist, examined
4 plaintiff.⁹ *Id.* at 307-12. Dr. Girgis reviewed plaintiff's medical records from his
5 May 2009 admission at St. Bernardine Medical Center, but based his opinion on
6 the examination alone. *Id.* at 308-09. Dr. Girgis observed that plaintiff had good
7 air movement in the lungs, a normal regular heart beat, and a normal gait. *Id.* at
8 309-11. Dr. Girgis opined that plaintiff could lift/carry twenty pounds
9 occasionally and ten pounds frequently, stand/walk four hours in an eight-hour
10 day, and sit six hours in an eight-hour day. *Id.* at 312. On September 9, 2009, Dr.
11 R. Jacobs, a State Agency physician, concurred with the majority of Dr. Girgis's
12 opinion, but opined that plaintiff stand/walk for six hours in an eight-hour
13 workday. *Id.* at 318-24.

14 On November 7, 2010, plaintiff was once again admitted to Riverside
15 Community Hospital for chest pain. *Id.* at 364-65. Dr. Patankar indicated plaintiff
16 had been readmitted to the hospital a few months prior.¹⁰ *Id.* at 368. Dr. Patankar
17 ordered a cardiac Lexiscan, which showed, inter alia, a fixed defect suggestive of
18 areas of peri-infarct ischemia and an ejection fraction of 47%. *Id.* at 368, 429.

19 **2. Dr. Estes**

20 Dr. Estes did not opine specific limitations for plaintiff, only that plaintiff
21 had "significant limitations" and could not return to work at the time. *Id.* at 357,
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23
24 ⁸ The record does not contain any evidence that plaintiff returned to Dr.
Patankar for this procedure.

25 ⁹ Plaintiff complained that Dr. Girgis did not know his name and did not have
26 his medical records. AR at 329.

27 ¹⁰ The record does not contain any notes from this purported hospital
28 admission.

59. The ALJ gave little weight to the opinion of Dr. Estes on the basis that his opinion was not supported by objective evidence, was inconsistent with the record as a whole, and was inconsistent with plaintiff's daily activities. *Id.* at 25. On balance, these reasons were not supported by substantial evidence.

First, lack of objective medical evidence may be a legitimate basis to reject a treating physician's opinion. "An ALJ may reject a treating physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti*, 533 F.3d at 1041; *Morgan*, 169 F.3d at 602 (a physician's opinion that is "'premised to a large extent upon the claimant's own accounts of his symptoms and limitations' may be disregarded where those complaints have been 'properly discounted'") (quoting *Fair*, 885 F.2d at 605).

Here, the ALJ correctly noted that Dr. Estes's opinion was based, in large part, on plaintiff's subjective complaints rather than objective findings and that he treated plaintiff conservatively. *See* AR at 25. During his examinations, which occurred once every three months, the objective findings were normal. *See, e.g., id.* at 328-30. Although not entirely bereft of objective evidence – plaintiff had poor ventricular function, a below normal ejection fraction, and was observed getting short of breath while walking in Dr. Estes's office – there were few objective and clinical findings. *See id.* at 227, 359. And despite Dr. Estes's concerns, he felt treatment with medication was sufficient and determined that he only needed to examine plaintiff once every six months. *See, e.g., id.* at 357-59. Because Dr. Estes's opinion was premised primarily on plaintiff's subjective complaints, which were partially properly discounted, lack of objective findings and conservative care were proper bases to reject Dr. Estes's opinion.

But the ALJ incorrectly concluded that Dr. Estes's opinion was inconsistent with the overall record. *Id.* at 25. The record shows that subsequent to his heart attack, plaintiff was admitted to the hospital on at least two occasions for chest pain. *Id.* at 288-96; 364-65. During the first admission in June 2009, Dr. Patankar

1 performed several procedures and observed that plaintiff had a left ventricular
2 ejection fraction of 40% with anteroapical hypokinesis and a 100% occluded ostial
3 iliac artery. *Id.* at 297. Dr. Patankar recommended that plaintiff return to open up
4 his iliac artery. *Id.* During the November 2010 admission, tests showed a fixed
5 defect suggestive of areas of peri-infarct ischemia and an ejection fraction of 47%.
6 *Id.* at 429. Thus, contrary to the ALJ's determination, the record as a whole
7 offered objective findings to support Dr. Estes's opinion.

8 In addition, the ALJ found that Dr. Estes's opinion was inconsistent with
9 plaintiff's daily activities. *Id.* at 25. As discussed above, plaintiff's daily
10 activities were not inconsistent with his symptoms.

11 On balance, the ALJ erred in rejecting Dr. Estes's opinion that plaintiff had
12 limitations in his ability to work.¹¹ Although Dr. Estes observed few objective and
13 clinical findings during his examinations to support his opinion, the overall record
14 contained objective findings. And plaintiff did not engage in daily activities
15 inconsistent with Dr. Estes's opinion. Therefore, the ALJ's determination was not
16 supported by substantial evidence.

17 **3. Dr. Girgis and Dr. Jacobs**

18 The ALJ gave significant weight to Dr. Girgis and Dr. Jacobs. *Id.* at 25.
19 Plaintiff argues that the ALJ should not have given significant weight to Dr.
20 Girgis's opinion because he offered an opinion without reviewing plaintiff's
21 medical records. P. Mem. at 15-16. Without Dr. Girgis's opinion, Dr. Jacob's
22 opinion would not constitute substantial evidence. *Id.* at 17.

23 Plaintiff is partially correct that Dr. Girgis did not review his medical
24 records. *Id.* at 15-16. Dr. Girgis only reviewed plaintiff's hospital records from
25 his admission at St. Bernardine Medical Center in May 2009, but did not review
26

27 ¹¹ The court notes, however, that Dr. Estes did not specify what limitations
28 plaintiff had.

1 additional records from Riverside Community Hospital or Dr. Estes. AR at 308-
2 09. Nevertheless, plaintiff is incorrect that the ALJ should not have given great
3 weight to Dr. Girgis's opinion. Dr. Girgis conducted an independent examination
4 of plaintiff, which by itself constitutes substantial evidence. *See Tonapetyan*, 242
5 F.3d at 1149; *see also* AR at 307-12.

6 As for Dr. Jacobs's opinion, had it been identical to Dr. Girgis's opinion, it
7 could constitute substantial evidence. *See Lester*, 81 F.2d at 831 (stating that the
8 opinion of a nonexamining doctor, by itself, did not constitute substantial
9 evidence). But in reaching his RFC determination, the ALJ rejected Dr. Girgis's
10 opinion that plaintiff was limited to standing and/or walking four hours out of an
11 eight-hour workday and relied on Dr. Jacobs's opinion that plaintiff could stand
12 and/or walk six hours out of an eight-hour workday. AR at 25. The ALJ offered
13 no explanation for why he rejected that aspect of Dr. Girgis's opinion. Because
14 only Dr. Jacobs opined this lesser restriction, this part of his opinion did not
15 constitute substantial evidence.

16 Further, contrary to the opinions of Dr. Girgis and Dr. Jacobs, to which he
17 purportedly gave "significant weight," the ALJ determined that plaintiff could sit
18 for two hours, rather than six hours out of an eight-hour day, on the basis that the
19 medical records support such a finding. AR at 25. There is no evidence to support
20 the ALJ's determination.

21 Accordingly, the ALJ erred because he failed to provide specific and
22 legitimate reasons, supported by substantial evidence, for rejecting Dr. Estes's
23 opinion, and because he adopted Dr. Jacobs's opinion that plaintiff could stand
24 and/or walk six hours a day when that opinion was not supported by substantial
25 evidence. But the ALJ did not err by giving significant weight to Dr. Girgis's
26 opinion.

C. The ALJ Failed to Provide Germane Reasons for Rejecting the Opinion of a Lay Witness

Plaintiff argues that the ALJ failed to properly consider the opinion of a lay witness, James Constant. P. Mem. at 18-22. Specifically, plaintiff complains that the three reasons offered by the ALJ for rejecting Constant's testimony were not germane. *Id.* The court agrees.

"[L]ay testimony as to a claimant's symptoms or how an impairment affects ability to work *is* competent evidence and therefore *cannot* be disregarded without comment." *Stout v. Comm'r*, 454 F.3d 1050, 1053 (9th Cir. 2006) (internal quotation marks, ellipses, and citation omitted); *see Smolen*, 80 F.3d at 1288; *see also* 20 C.F.R. §§ 404.1513(d)(4), 416. 913(d)(4) (explaining that the Commissioner will consider all evidence from "non-medical sources[,]" including "spouses, parents and other caregivers, siblings, other relatives, friends, neighbors, and clergy"). The ALJ may only discount the testimony of lay witnesses if he provides specific "reasons that are germane to each witness." *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 2003); *accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2011) ("Lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he or she expressly determines to disregard such testimony and give reasons germane to each witness for doing so.").

In a Third Party Function Report, Constant, plaintiff's domestic partner, indicated that plaintiff fed the dogs, spent approximately thirty minutes preparing simple meals, did some laundry, picked up after cooking, shopped for groceries but tired quickly when doing so, talked with people daily, could not walk very far before needing to rest, and tired easily. AR at 203-10. Subsequently, at the hearing, Constant testified that he helped plaintiff on a daily basis with lifting and household chores. *Id.* at 50. Constant further explained that plaintiff had good and bad days, and the bad days occurred a couple of times a week. *Id.* at 52.

1 Here, the ALJ discounted Constant's testimony on the bases that "the
2 opinion of a layperson is far less persuasive . . . than . . . the opinions of medical
3 professionals[,]" he was biased, and his testimony was not supported by medical
4 evidence. *Id.* at 23.

5 The ALJ's first reason – Constant is not a medical professional – was not
6 germane to Constant. Although, an ALJ may reject lay testimony if it conflicts
7 with medical evidence, he may not discount lay testimony solely on the basis that
8 it is lay testimony. *See Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)
9 (explaining that an ALJ is required to consider the testimony of a lay witness); *see*
10 *also Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Otherwise, an ALJ
11 can dismiss all lay testimony without consideration.

12 Similarly, the ALJ's rejection of Constant's testimony on the ground that, as
13 plaintiff's domestic partner, Constant was biased also "amount[s] to a wholesale
14 dismissal of the testimony of all [lay] witnesses as a group and therefore does not
15 qualify as a reason germane to" Constant. *Smolen*, 80 F.3d at 1289.

16 Finally, the ALJ's third reason for rejecting Constant's testimony is not
17 supported by substantial evidence. The ALJ stated that Constant's statements
18 were not supported by "any clinical or diagnostic medical evidence." AR at 23.
19 But as discussed above, multiple tests showed that plaintiff had poor left
20 ventricular function and below average ejection fraction. *Id.* at 227, 297, 299,
21 429. Based on various procedures, Dr. Patankar determined that plaintiff should
22 undergo a procedure to open up his iliac artery. *Id.* at 297-98. Dr. Estes observed
23 that plaintiff had shortness of breath easily. *Id.* at 359. Thus, there was both
24 clinical and diagnostic medical evidence to support Constant's testimony.

25 In short, the ALJ erred when he rejected Constant's testimony without
26 offering reasons germane to Constant and supported by substantial evidence.

V.

REMAND IS APPROPRIATE

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). Where no useful purpose would be served by further proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (decision whether to remand for further proceedings turns upon their likely utility). But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a plaintiff disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211 F.3d at 1179-80.

Here, as set out above, remand is required because the ALJ erred by failing to properly consider the opinions of plaintiff's treating physician and lay witness, and by accepting the unsupported opinion of Dr. Jacobs. On remand, the ALJ shall: (1) reconsider the opinion of Dr. Estes, and either credit his opinion or provide specific and legitimate reasons for rejecting it; (2) reconsider the opinion of Dr. Jacobs regarding plaintiff's ability to stand and/or walk, and either cite evidence to support the opinion or reject it; (3) reconsider the opinion of lay witness Constant, and either credit his opinion or provide a reason germane to him for rejecting it; and (4) reconsider plaintiff's credibility, ensuring that the record is fully developed, including by obtaining documentation concerning plaintiff's earnings in 2008 and any new medical notes. *See Antoniewicz v. Astrue*, 371 Fed. Appx. 854, 856 (9th Cir. 2010) (noting that the ALJ requested that claimant's counsel produce claimant's bank records to show her earnings in order to determine her eligibility). The ALJ shall then proceed through steps four and five

1 to determine what work, if any, plaintiff is or was capable of performing and for
2 what period of time.

3 **VI.**

4 **CONCLUSION**

5 IT IS THEREFORE ORDERED that Judgment shall be entered
6 REVERSING the decision of the Commissioner denying benefits, and
7 REMANDING the matter to the Commissioner for further administrative action
8 consistent with this decision.

9
10 DATED: April 16, 2013

A handwritten signature in black ink, appearing to read 'SHERI PYM', written over a horizontal line.

11 SHERI PYM
12 United States Magistrate Judge
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